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Brief of Guernsey for Appellees.

Supreme Court U.S.
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Supreme Court of the United States.

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OCTOBER TERM, 1898.

NO. 288.

WALTER M. McCAIN, ET AL.,
Appellants.

vs.

CITY OF DES MOINES, ET AL.
Appellees.

FROM THE CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF IOWA.

On Behalf of the Des Moines Brick Manufacturing Company, Appellee.

N. T. GUERNSEY,
Attorney for Said Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 238.

WALTER M. McCAIN, ET AL,

vs.

CITY OF DES MOINES, ET AL.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA.

Brief of the Des Moines Brick Manufacturing Company, Appellee.

The sole question in this case is whether the court below erred in dismissing the complainant's bill for want of jurisdiction. While ostensibly brought to set aside the annexation of certain property to Des Moines, this suit is, in fact, an effort on the part of certain property holders to avoid the payment of a special assessment against them on account of the cost of paving a street in front of their property. There are no allegations that the work was not properly done, or that the property was not benefitted in an amount at least equal to the amount of the assessment, or that there were any irregularities or informalities in the letting of the contract, or in the levying of the assessment after the work was completed. It is contended, however, by the complainants that the territory within which the improvement was

made was not subject to the jurisdiction of the City of Des Moines because of an alleged invalidity in the annexation proceedings by which it was annexed to the city. They ask that the annexation proceedings be annulled, the annexed territory be cut off from the city, that all taxes levied by the city, including these special assessments, be declared invalid, and for a mandatory injunction requiring the old corporation formerly having jurisdiction over the annexed territory to resume its functions.

The facts are as follows: In the year 1890 and prior thereto the City of Des Moines was a city of the first class organized under the general incorporation laws of the state of Iowa, and the Town of Greenwood Park was an incorporated town organized under the same laws. The town of Greenwood Park embraced a comparatively small amount of territory adjoining the City of Des Moines upon the west. By an act of the legislature of Iowa, approved March 13, 1890, which is printed on pages six *et seq.* of the brief of appellants, it was provided that the Town of Greenwood Park and other property adjacent to the then City of Des Moines should be annexed to and become a part of the said city. This act provides for an immediate reorganization of the city, the date of the first election being fixed as the first Monday in April, 1890, a little over two weeks after the bill was enacted. In October, 1897, about seven and one half years after the reorganization of the City of Des Moines under the provisions of this act, the complainants filed this bill. The bill was dismissed for want of jurisdiction.

The contention of the complainants is that the annexation law was invalid because within the inhibition of the constitution of Iowa prohibiting special legislation as to such matters; and that therefore the annexation proceedings are invalid, so that the taxes levied by the City of Des Moines on the annexed territory were levied without authority of law and consequently, that the levy of such taxes constituted a taking of their property without due process of law and in

contravention of the provisions of the federal constitution.

Another claim asserted is that because the annexation proceedings were not had under a law that applied to every municipality in the state, the citizens of this annexed territory have been deprived of the equal protection of the laws.

The case turns solely upon the construction of the constitution and laws of the state of Iowa. After the annexation proceedings had been had, an action in *quo warranto* was commenced on the relation of one A. G. West in order to test the validity of the annexation proceedings which are here in question. This case went to the supreme court of Iowa, where it was decided at the January term, 1896. See State ex. rel. vs. City of Des Moines, 96 Iowa, 521. In this case it was held that the annexation law was vulnerable to the objection, that it was special legislation in contravention of the constitution of Iowa, but that the acquiescence in the annexation proceedings had been so long continued that even the state was estopped from questioning their validity or the jurisdiction of the city of Des Moines over this annexed territory.

In the case of Windsor vs. City of Des Moines, which was decided by the supreme court of Iowa on February 12, 1897 and is reported in 101 Iowa, 343, the validity of the contract for the paving in question in this suit was directly involved, some of the complainants to this suit being parties to that one, and it was there decided by the supreme court of Iowa that this contract is a valid one.

POINTS.

I.

The control of municipal corporations is a matter that is peculiarly within the jurisdiction of the state.

Cooley's Constitutional Limitations, 6th Ed., p. 228.
Dillon on Municipal Corporations, 4th Ed., Sec. 185.

Laramie County vs. Albany County et al, 92 U. S., 307.
Mt. Pleasant vs. Beckwith, 100 U. S., 514-524.
Meriwether vs. Garrett, 102 U. S., 472-501.

II.

In matters of state law, the federal courts are bound by the construction adopted by the state courts.

Town of South Ottawa vs. Perkins, 94 U. S., 268.
Leeper vs. Texas, 139 U. S., 462-467.
Marchant vs. Penn. R. R. Co., 153 U. S., 380.
Iowa Central Ry. Co. vs. Iowa, 160 U. S., 389.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

III.

The allegations of their bill do not show that the complainants have been deprived of their property without due process of of law.

Leeper vs. Texas, 139 U. S., 462-467.
Baldwin vs. Kansas, 129 U. S., 52.
Kelley vs. Pittsburgh, 104 U. S., 80.
Marchant vs. Penn. R. R. Co., 153 U. S., 380.
Iowa Central Railway Co. vs. Iowa, 160 U. S., 389.
Conde vs. York, 168 U. S., 642-648.

IV.

The cases cited in the opinion of the court below amply sustain it in going to the essence of this controversy to determine its character.

Starin et al. vs. New York, 115 U. S., 248-257.
Shreveport vs. Cole, 129 U. S., 36-41.
New Orleans vs. Benjamin, 153 U. S., 411.

V.

The facts alleged do not show that the complainants have been denied the equal protection of the laws.

Missouri vs. Lewis, 101 U. S., 22.
Hayes vs. Missouri, 120 U. S., 68.
Moore vs. Missouri, 159, U. S., 673.
Marchant vs. Penn. R. R. Co., 153 U. S., 380, 389.

The rule has been to create municipal corporations by special acts.

Dillon on Municipal Corporations 4th Ed., Sec. 39.
Burke vs. Jeffries, et al. 20 Iowa, 145.
Dillon on Municipal Corporations, 4th Ed., Sec. 44.

VI.

Proceedings to test the validity of a municipal corporation must be by an action in quo warranto.

Sharpleigh vs. San Angelo, 167 U. S., 646, 651.
Graham vs. City of Greenville, 67 Texas, 62.
Town of Decorah vs. Gillis, et al, 10 Iowa, 234.
Beach on Public Corporations, Sec. 55.
Cooley's Constitutional Limitations 6th Ed., pp. 309 and 310.
National Life Ins. Co. vs. Board of Education, 62 Fed. Rep., 778.
Ashley vs. Board of Supervisors, 60 Fed. Rep., 55.
Powell vs. City of Greensburg, 49 N. E. Rep., 955.
Clement vs. Everest, 29 Mich., 19-22.
Town of Geneva vs. Cole, 61 Ill., 397.
Tisdale vs. Town of Minonk. 46 Ill., 9.
Beach on Public Corporatiens, Sec., 55.
Dillon on Municipal Corporations, Secs. 43 and 994.
Color vs. Dwight Township, 55 N. W. Rep., 587.
Black vs. Town. of Brinkley, 15 S. W. Rep., 1030.
Mendenhall vs. Burton, 22 Pac., 558.
Railroad Co. vs. Wilson, 6 Pac., 281.

School District vs. School District, 26 Pac., 43.
Railway Co. vs. Shires, 108 Ill., 625.
School District vs. Inspectors, 27 Mich., 2.
People vs. Maynard, 15 Mich. 470.,
Stuart vs. School District, 30 Mich., 3.
McCleskey vs. State, ex. rel. 23 S. W. Rep., 518.

I.

The control of municipal corporations is a matter that is peculiarly within the jurisdiction of the legislature of the State.

This preliminary proposition cannot be controverted. It is of importance here because it is an exercise of this power that is the fundamental basis of the complaint which is made by the appellants. Judge Cooley, in his work on Constitutional Limitations, Sixth Edition, p. 228, says:

> "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purpose of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense that the constitutional provision which prohibits the obligation of contracts being violated. Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs."

The same rule is laid down by Judge Dillon in his work on Municipal Corporations, Fourth Edition, Section 185, from which we quote as follows:

"Not only may the legislature originally fix the limits of the corporation, *but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory*, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this *power of compulsory annexation* that the territory thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restrictions, belongs wholly to the legislature to determine."

The doctrine is fully stated by this court in the case of Laramie County v. Albany County et al, 92 U. S., 307. We quote from the opinion as follows:

"Counties, cities and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature: but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted.

Uuless the constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d Ed., 192."

* * * * *

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatable with everything of the nature of compact. *Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones*, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. School Society v. School Society, 14 Conn., 469; Bridge Company v. East Hartford, 16 id., 172; Hampshire v. Franklin, 16 Mass., 76; North Hemstead v. Hemstead. 2 Wend., 109; Montpelier v. East Montpelier, 29 Vt., 20; Sill v. Corning, 15 N. Y., 197; People v. Draper, id., 549; Waring v. Mayor, 24 Ala., 701; Mayor v. The State, 15 Md., 376; Ashley v. Wellington, 8 Pick., 524; Baptist So. v. Candia, 2 N. H., 20; Denton v. Jackson, 2 Johns. Ch., 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of the State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. Granby v. Thurston, 23 Conn. 419; Yarmouth v. Skillings, 45

Me., 142; Langworthy v. Dubuque, 16 Iowa, 273; Justices' Opinion, 6 Cush., 577.

* * * * *

Old towns may be divided or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. Bristol vs. New Chester, 3 N. H., 521.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change should be made."

This doctrine is reiterated in

Mt. Pleasant vs. Beckwith, 100 U. S., 514-524.

Meriwether vs. Garrett, 102 U. S., 472-501.

These cases fully support the proposition that there is nothing in the federal constitution which imposes any direct limitation upon the powers of the states over the organization of municipal corporations. These corporations are purely creations of the state legislature, and so far as the federal

constitution is concerned, exist merely at the will of the legislature of the state.

In the case at bar, the sole contention of the appellants is that the state of Iowa has violated their rights under the federal constitution by merging the Town of Greenwood Park into the city of Des Moines. Under the federal constitution, neither the Town of Greenwood Park nor its citizens, had any vested right in the continuation of the corporate existence of the Town of Greenwood Park; nor did the federal constitution confer upon them any right to maintain this existence, or to prevent the merger of the town into another municipal corporation, or to fix the terms upon which such consolidation might be made. This relation which a municipal corporation sustains to the state in its character as a mere subordinate agency to aid the legislature in performing the functions of government is especially material in the determination of the questions which are suggested by this appeal.

II.

In matters of state law, the Federal Courts are bound by the construction adopted by the state courts.

Town of South Ottawa vs. Perkins, 94 U. S., 268.
Leeper vs. Texas, 139 U. S., 462-467.
Marchant vs. Pennsylvania R. R. Co., 153 U. S., 380.
Iowa Central Railway Company vs. Iowa, 160 U. S., 389.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

The sole question in this case is as to the effect of the construction of the laws of the State of Iowa. If, under its laws the annexation proceedings were valid, then the authority to impose these various burdens existed, and the entire case made by the complainant's bill falls. If, on the other hand, these proceedings are invalid under the laws of Iowa, in a proper proceeding the courts of that state will so decide; but this again involves nothing that brings in question any of the

provision of the Constitution of the United States.

As was said by Judge Shiras in his opinion in the court below, "the determination thereof depends wholly on the construction of the state constitution and laws, and it is a question upon which the decision of the supreme court of the State is absolutely binding upon this court." Not only is this true but this is a question which the supreme court of the State has already decided in State *ex rel.* West vs. City of Des Moines, 95 Iowa, 521. In that case the supreme court of Iowa decided definitely and unequivocally in favor of the validity of the annexation. It is true that in that case the supreme court of Iowa decided that the statute in question is unconstitutional, because special; but it also decided after an exhaustive consideration of the question, that the state, by reason of its acquiesence in the annexation proceedings, was estopped from assailing the validity of the proceedings in question,

That suit was brought about four years after the annexation proceedings were had. The complainants here acquiesced in them for almost another four years. Even if it were true that they have the right, in a private suit of this character, to question the validity of the annexation proceedings, the law of Iowa, as announced in State ex. rel. West vs. City of Des Moines, is that by reason of this delay and laches, and by reason of the complications that would ensue because of such delay, the complainants could in no event maintain the present bill. In the case at bar, this court is bound by the law of Iowa, as announced in the opinion to which we have just referred. If this case were to be considered upon the merits, the first question presented to the federal court would be the constitutionality of the annexation law, and upon this question that court would be bound by the decision in the case of the State ex. rel. West vs. City of Des Moines; and the next question that would be presented to that court would be the effect of delaying for seven years the attack upon the validity of the annexation

proceedings, and upon this question the federal court would again be bound by the decision of the Supreme Court of Iowa in the case to which reference has just been made.

The application to the facts of this case of the rule that this court is bound by the decisions of the State courts in matters arising under the State laws emphasize the proposition that this case involves nothing save questions arising under the State laws. Nothing, perhaps, demonstrates this more clearly than the fact that this court could not grant to the complainants the relief for which they pray in this action without overruling the State ex. rel. West vs. City of Des Moines upon the two questions of purely local law, which are the only questions that are decided in that case.

III.

The Allegations of the Bill do Not Show That the Complainants Have Been Deprived of Their Property Without Due Process of Law.

The mere general averments in the bill, that rights claimed by the complainants under the Constitution of the United States have been infringed, cannot be relied upon to import into the case a federal question. If the case is "one arising under the Constitution * * * of the United States," this must appear from the facts which are set out as the foundation of the claim which is asserted by the complainants. If those facts do not show that this suit so arises, but, on the contrary, show that it involves solely a question of State law, then the character of the controversy cannot be changed by charging a legal conclusion where the facts are such that such a conclusion cannot properly be drawn from them.

The right of the complainants to relief upon their theory of this case depends solely upon the question as to the validity of the annexation of the Town of Greenwood Park to the City of Des Moines. If that annexation is valid, either by virtue of the statute, or by virtue of anything else, their

whole case falls. If, on the other hand, the annexation is invalid for any reason, upon the theory of the bill they are entitled to the relief which they demand, and nothing is left in the case except to make the formal proof in order to furnish the basis for the details of the decree which should annul the annexation proceedings. This question as to the validity of the annexation proceedings is a question solely of state law. It is, as we have seen, a matter that is peculiarly within the jurisdiction of the local authorities. It is a matter as to which the constitution of the United States imposes no restrictions upon the local authorities.

This is well illustrated by the recent case of Forsyth vs. Hammond, 166 U. S., 506. In that case the question involved the validity of certain annexation proceedings in the state of Indiana. The annexation has been sustained by the state courts. In an action pending in the federal court, the circuit court of appeals has rendered an opinion holding the annexation invalid. Under these circumstances, before the final determination of the case in the federal court, and because of this conflict between these two courts of concurrent jursdiction, this court granted a writ of certiorari, and, after full consideration of the matter, sent the case back to the circuit court for the District of Indiana, with instructions to follow the decision of the supreme court of Indiana by dismissing the bill. In that case, page 518, these questions are recognized as matters of a purely local nature involving only questions arising under the state constitution and statutes, and as therefore questions as to which this court is concluded by the judgment of the state court.

The only question in the case at bar is whether the annexation proceedings are valid under the laws of Iowa.

In Leeper vs. Texas, 139 U. S., 462-467, this court expressly says that such a question is not a federal question. We quote as follows:

"It must be regarded as settled. * * * That whether the statutes of a legislature of a State have been

duly enacted in accordance with the requirements of the constitution of such State, is not a federal question, and the decision of state courts as to what are the laws of the State is binding upon the courts of the United States."

In Baldwin vs. Kansas, 129 U. S., 52.

It was contended that in convicting the defendant, there had been a disregard of the laws and the constitution of the state of Kansas, and that therefore, the conviction was without due process of law and in violation of the federal constitution. This court disposes of this contention in a very summary manner, saying, on page 57:

"The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the constitution of the state of Kansas was complied with or not in the proceedings on the trial which are challenged, are not Federal question which this court can review."

A case strongly in point is the case of

Kelly vs. Pittsburg 104 U. S., 80.

There, by an act of the legislature, certain outlying land was made a part of the City of Pittsburg. Kelly filed his bill to restrain the levy of taxes upon this property for city purposes, asserting that the land was taxed enormously beyond its value, so as to almost destroy his interest in the property. He set up the fifth and fourteenth amendments to the Constitution. This case clearly recognizes the doctrine that the question as to the organization of cities and towns is one of local jurisdiction involving no federal question.

Another case to which we call attention is

Marchant vs. Pennsylvania R. R. Co., 153 U. S., 380.

There the plaintiff claimed damages on account of the operation of an elevated railroad belonging to the Railroad

Company and abutting on the south side of Filbert street in the City of Philadelphia, in front of plaintiff's property. The question as to the plaintiff's right to recover depended upon the laws and constitution of the state of Pennsylvania. The court says in this connection:

> "We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and constitution of that state, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

In Iowa Central Railway Company vs. Iowa, 160 U. S., 389, the decision again turned upon whether a federal question could be predicated upon an erroneous construction by the state tribunals of the state laws. In that case this court says:

> "Whether the court of last resort of the state of Iowa properly construed its own constitution and laws in determing that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the Constitution of the United States or upon any act of congress."
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> * * * * *
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> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of the state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy

pending before it that the averments of an answer set forth no defence to the claim of the plaintiff.

It was not a denial of right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the state as justifying the refusal."

In Conde vs. York, 168 U. S., 642-648, this court says:

"In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; *and the statute or authority must be directly in issue.*"

The authorities which we have cited clearly demonstrate that this case is not one arising under the Constitution of the United States. If the state of Iowa were an independent sovereignty, so that the Constitution of the United States might be eliminated from the consideration of this case, it would in no wise affect the questions which are presented, or the conclusions which it would be necessary to reach in their determination.

The argument of appellants apparently is that because the annexation proceedings are invalid, exercise of municipal authority by the City of Des Moines is unauthorized and that consequently any taking of their property thereunder is unlawful, so that it is without due process of law, and in contravention of the federal Constitution. If this course of argument were sound, there would be no case in which it is claimed that a statute was in violation of the state constitution which would not present a federal question. It would give the Circuit Courts original jurisdiction over every case involving a claim that a state statute was in violation of a state constitution. It would go further than this, giving the Circuit Court jurisdiction over all cases where the validity of a state statute was, for any reason, drawn in question.

Such cases are not cases which arise under the Constitution of the United States. It is not directly brought in question. In all of such cases the state tribunal is the proper tribunal to determine whether or not the enactment of the state legislature is valid. In the case at bar, if the complainants, instead of filing their bill in the federal court, had filed it in the proper state court, that court could have decided every question presented by these facts without any reference to the Constitution of the United States. In the case of the State ex rel. West vs. City of Des Moines, already referred to, the supreme court of Iowa has decided these questions. The complainants cannot come into the federal court and by an unwarranted averment that the case involves a federal question, seek in that court relief to which the supreme court of the State has held that they are not entitled. They cannot, by indirection, review in this court the decision of the supreme court of the state upon a purely local question.

IV.

The cases cited in the opinion of the court below, amply sustain it in going to the essence of this controversy to determine its character.

We quote from Starin et al vs. New York, 115 U. S., 248-257, as follows:

> "We will first consider whether the suit is one which arises under the Constitution or laws of the United States; for, if it is not, the order to remand was right, so far as the removal upon the application of all the defendants is concerned.
>
> The character of a case is determined by the questions involved. Osborn v. Bank of United States, 9 Wheat, 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United

States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. Cohens v. Virginia, 6 Wheat., 264, 379; Osborn v. Bank of United States, 9 Wheat., 737, 824; The Mayor v. Cooper, 6 Wall., 247, 252; Gold Washing & Water Co. v. Keyes, 96 U. S., 199, 201; Tennessee v. Davis, 100 U. S., 257, 264; Railroad Co. v. Mississippi, 102 U. S., 135, 140; Ames v. Kansas, 111 U. S., 449, 462; Kansas Pacific v. Atchison Railroad, 112 U. S., 414, 416; Provident Savings Co. v. Ford, 114 U. S., 635, 641; Pacific Railroad Removal Cases, 115 U. S., 1, 11."

Continuing, the court finds that the controversy in that case depended upon the constrution of the charter of the City of New York, and upon whether the ferries in question came within the monopoly granted to the city. The court says further:

"The decisions of these questions does not depend upon the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants or in another sustain them."

This extract is entirely applicable to the case at bar. Whether the annexation in question was valid depends upon the laws of Iowa, and there is nothing in the Constitution or laws of the United States which, if construed one way will sustain this annexation, or if construed another way will overthrow it.

In Shreveport vs. Cole, 129 U. S., 36-41, this court says:

"Unless this suit was one 'arising under the Constitution or laws of the United States,' the Circuit Court had no jurisdiction; *and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law, upon the determination of which the recovery depended, then it was not a suit so arising.* Starin vs. New York, 115 U. S., 248, 257; Gold Washing & Water Co., vs. Keyes, 96 U. S., 199.

The case at bar was in effect an action at law to

recover a balance alleged to be due the petitioners or plaintiffs upon a contract with the defendant, and the maintainance of the cause of action involved no Federal question whatever, nor is any such indicated in the judgment rendered. But the jurisdiction seems to have been rested upon the averments in plaintiffs' petition, that under article 209 of the state constitution of 1879, providing that 'no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollars of valuation,' the city of Shreveport, being so situated as to need all the revenue from such a tax. cannot raise funds to pay its just debts; that, therefore. plaintiffs are deprived by that article, 'if same be valid and operative,' of the remedy of enforcing payment by the levy of taxes, although their contract was entered into in 1871; and that so said article impairs the obligation of such contract. This contention, however, required the Circuit Court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defense to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively, to the destruction of an essential remedy existing when the contract was entered into, whereas the presumption in all cases is that the courts of the states will do what the Constitution and laws of the United States require. Chicago & Alton Railroad vs. Wiggins Ferry Co., 108 U. S. 18; Neal vs. Delaware, 103 U. S. 370, 389. And we find in accordance with that presumption that the Supreme Court of Louisiana holds, and had held prior to the commencement of this suit, that article 209 'must have a rigid enforcement with regard to all creditors whose rights are not protected by the Constitution of the United States, and with regard to all future operations of the city government of every kind whatever. But it is perfectly clear that the rights of antecedent contract creditors are protected by the Constitution of of the United States, and they are entitled to have them enforced 'in all respects as if' this provision of the Constitution 'had not been passed.' Von Hoffman vs. City of Quincy, 4 Wall., 535. The fact that the act of the State is a constitutional provision instead of a mere legislative act does not effect the case. Railroad Co. vs. McClure, 10 Wall., 511, 515. It is apparent, therefore, that whatever percentage of taxation may be required to meet the ma-

turing obligations in interest or principal of antecedent contract creditors must, in any and all events, be levied.' Moore vs. City of New Orleans, 32 La. Ann., 726, 747."

In conclusion, in the case just referred to, this court says:

"As remarked in Bernards Township vs. Stebbins, 109 U. S., 341, 353, it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same state and suits between citizens of different states, established by the Constitution and laws of the United States, 'from being evaded by bringing into Federal courts controversies between citizens of the same state.' We regard this suit as an evasion of that character."

We submit that this is entirely applicable to the case at bar.

The court below says:

"There can be no question that the complainants herein could have brought the suit in the State Court had they chosen that forum; can there by any question that they could have presented every ground they rely upon as a foundation for the claim that the asserted extension of the corporate limits and corporate powers of the City of Des Moines over their property is illegal and therefore invalid, without quoting any section of clause of the Federal Constitution or laws? Is it not clear that whatever court undertakes to pass upon the rights sought to be enforced in this case must solve the problems by a construction of the State Constitution and laws, and that in determining the pivotal question whether the property formerly included within the Town of Greenwood Park is now within the limits and subject to the control of the City of Des Moines, no clause or provision of the Federal Constitution or laws will be referred to or be brought up for consideration. It must then be held that this case is not one wherein the rights of the complainants to ask a decree restraining the City of Des Moines from continuing to exercise corporate authority over the territory in question is based upon any provision of the Federal Constitution or laws and as the right of recovery or to the relief sought would not be

affirmed by one construction or denied by another construction of the Federal laws, it cannot be rightfully said that the controversy is one arising under the Federal Constitution or laws and jurisdiction in this Court cannot be maintained on that ground.

Equally unavailing are the general averments that unless restrained the city of Des Moines will continue to exercise its corporate authority over the property of complainants; will continue the work of improving the streets in the territory of Greenwood Park and will levy taxes on the property therein for the payment of street improvements and of the city debt, and that thereby the property of complainants will be subjected to burdens without due process of law and be taken without compensation. It is open to complainants to attack the validity of the asserted extension of the city limits in the state courts, unless that question is settled by the decision of the supreme court of Iowa in the case already cited. There is no provision in the laws of Iowa which preclude the complainants from obtaining a hearing upon all the questions which are presented by the bill filed in this suit. Of a case brought for that purpose the state court would have jurisdiction. If in the progress thereof the complainants should seek to rely upon any right or immunity granted by the federal constitution or laws, the state court could give them the full benefit thereof, or if such benefit was refused, the parties could carry the question before the supreme court of the United States and obtain protection therefrom. Thus in New Orleans vs. Benjamin, 153 U. S., 411, a case which in some of its features is similar to the one now under consideration, it was held that the circuit court had not jurisdiction, it being therein said that 'Ordinarily the question of the repugnancy a state statute to the impairment clause of the constitution is to be passed upon in the state courts in the first instance, the presumption being in all cases they will do what the constitution and laws of the United States require. Chicago & Alton R. R. Co. vs. Wiggins Ferry Co., 108 U. S., 18; and if there be ground of complaint for their decision, the remedy is by writ of error under Section 709 of the Revised Statutes." It is not claimed or averred in this bill, nor could it be so claimed rightfully, that under the constitution and laws of Iowa, a party can be deprived of his property without giving him his day in court, or that property can be taken

for a public use without due compensation, or that provision is not made enabling every one whose property is assessed and taxed, to question the validity of the tax. When traced to its real foundation, the claim asserted by complainants, that without due process of law, their property is being burdened with assessments is based upon the theory that the laws of Iowa do not afford them ample means for testing the validity of the assessments made, but it is based upon the claim that their property is not within the limits of the city of Des Moines, is not therefore subject to the control of the city authorities and cannot be lawfully assessed or taxed by them. It is manifest, however, that the legality or illegality of the actions the city is dependent upon the question whether the territory of Greenwood Park now forms part of the city of Des Moines, and the existence of this disputed question does not show that the complainants are in any proper sense denied due process of law for the protection of their rights or that they are denied the equal protection of the laws within the meaning of the federal constitution."

Tested by the rule of this court in

New Orleans vs. Benjamin, 153 U. S., 411,

The jurisdiction must undoubtedly fall, and the decree of the court below must be sustained.

We quote from the Benjamin case as follows:

"The first and third question propounded relate to the jurisdiction of the Circuit Court, which was invoked on two grounds: (1). That the case was one arising under the Constitution of the United States; and (2) on diverse citizenship.

1. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution. Shreveport vs. Cole, 129 U. S., 36; Starin vs. New York, 115 U. S., 248,257; Gold Washing & Water Co. vs. Keyes, 96 U. S., 199.

The judicial power extends to all cases in law and equity arising under the Constitution, but these are

cases actually and not potentially arising, and jurisdiction cannot be assumed on a mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and the laws of the United States require, Chicago & Alton Railroad Co. vs. Wiggins Ferry Co., 108 U. S. 18; and if there be ground of complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation."

The case at bar does not really and substantially involve any dispute or controversy as to the effect or construction of the constitution of the United States, upon the determination of which the result depends, and is not a suit arising under the constitution.

V.

The facts alleged do not show that the complainants have been denied the equal protection of the laws.

The complainants very briefly present the claim that they have brought themselvss within the provision of the federal constitution, which guarantees to each citizen the right to the equal protection of the laws. The theory of the complainants upon this proposition is left by their brief and by their bill largely to inference.

Their argument apparently is that since there were other statutes of the state of Iowa at the time the annexation law was passed under which this territory might have been annexed, which statutes were applicable generally throughout the state, therefore, the annexation by virtue of this statute

denied them the equal protection of the laws, in that the provisions of this law differed from those which were applicable to the state generally.

This argument assumes that there is a statute here which is binding upon the complainants, but not binding upon all others similarly situated, or upon all other citizens of the state. One fundamental error in it is that it ignores the fact that in sustaining this annexation, the supreme court of the state has not only not assumed that this statute is valid, or that the appellants are bound by it, but has further expressly decided that the statute is unconstitutional; and has sustained the annexation, not under the statute, but without reference to the statute, and solely upon the proposition that acquiescence has estopped the state from asserting that the proceedings were invalid.

This proposition is a proposition of law that is applicable to every citizen of the state, so that in this controversy there is involved neither any statute nor any rule of law that is not generally applicable to every citizen of the state of Iowa. The jurisdiction of the City of Des Moines over this territory is not sustained by a void statute. The City of Des Moines could not assert the right to exercise jurisdiction over this territory under the statute in question, because in the State *ex rel.* West vs. City of Des Moines, the supreme court of Iowa has decided that this statute is void, and that the City of Des Moines acquired no rights by virtue of it. The sole basis of the City's right in the premises is the estoppel. The entire argument of the appellants upon this question is predicated upon the erroneous assumption that the rights of the City are exercised by virtue of this void statute.

But if they were right in their contention that the City's authority is exercised by virtue of this void statute, applicable only to the enlarged City of Des Moines, their contention that this constitutes a denial of the equal protection of the laws is unsound. It is not claimed that this statute does not operate with equal effect upon all persons within the limits

of the enlarged City. Under these circumstances, there is no infringement of this constitutional right.

A case strongly in point is

Missouri vs. Lewis, 101 U. S., 22.

Under the constitution and laws of Missouri, an appeal lies to the supreme court of that state from any final judgment or decree of any circuit court, except those in four counties and in the city of St. Louis, for which counties and city there is established a court of appeals, called the St. Louis court of appeals, which has exclusive jurisdiction over all the appeals from the said counties and city. From the St. Louis court of appeals an appeal lies to the supreme court only in cases where the amount in dispute, exclusive of costs, exceeds two thousand five hundred dollars, and in cases involving constitutional questions. The case under consideration was not appealable from the St. Louis court of appeals, but if it had arisen in the circuit court of another county, it would have been appealable to the supreme court. It was contended that these facts constituted a denial to the suitors in the courts of St. Louis of the equal protection of the laws. We quote from the opinion as follows:

"If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all native and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any persons from life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made.

* * * * * *

The last restriction, as to the equal protection of the

the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.

* * * * *

The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies."

Another case involving this proposition is

Hayes vs. Missouri, 120 U. S., 68.

It was provided by the laws of Missouri that in all capital cases, except in cities having a population of over one hundred thousand inhabitants, the state should be allowed eight peremptory challenges to jurors, and, in such cities, fifteen. The plaintiff in error, having been sentenced to death on a charge of murder, asserted that he had been denied the equal protection of the law, because of this discrimination in

the number of peremptory challenges allowed the state. In this case the court says:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privilege conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment,' 113 U. S., 27, 32."

Another case of a somewhat similar character is

Moore vs. Missouri, 159 U. S., 673.

The same rule is also announced in

Marchant vs. Pennsylvania. R. R., 153 U. S., 380–389.

From which we make the following extract:

"The question thus raised is within the case of Missouri vs. Lewis, 101 U. S., 22, where it was said that 'the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.' So in Hayes vs. Missouri, 120 U. S., 68, where by a statute of the State of Missouri it was provided that, in capital cases, in cities having a population of over one hundred thousand inhabitants, the state shall be allowed fifteen peremptory challenges, while elsewhere in the state it is allowed only eight peremptory challenges, it was held that such a distinction did not deny to a person accused and tried for murder in a city containing over one hundred thousand inhabitants the equal protection of the laws enjoined by the Fourteenth Amendment, and in the course of the discussion it was said: "The Fourteenth Amendment to

the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. As we said in Barbier v. Connolly, 113 U. S., 27, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'"

There is nothing in the case of Gulf, Colorado and Santa Fe Railway Company vs. Ellis, 165 U. S., 150, which in any degree militates against the doctrine which is announced in the cases to which we have referred. The act in question there was an act imposing a penalty. It was a gross and radical discrimination against railroad companies. If the litigation terminated adversely to them, they were compelled to pay the attorney fees of the successful plaintiff. If the companies were successful, they could not recover any attorney fee. The statute was unequal. If the statute had provided that in all suits of the character therein described, the successful party could recover attorney fees, this objectionable element of discrimination would have been lacking. It was this element of unfairness and injustice that justified the conclusion reached in the Ellis case.

Municipal corporations have been created from time immemorial by grant of special charters and by special acts of legislature. At present, there are many states in which they are so created. In the state of Iowa, there are several cities organized under special charters, which were granted before the adoption of the present constitution of the state. It is not even contended that to so create a municipal corporation or to so enlarge its boundaries constituted a denial of the equal protection of the laws.

An examination of the history of the creation of municipal corporations shows that until a comparatively recent date, both in this country and in England, such corporations have been organized usually by special charter. It was not until 1835 that England adopted a general law for the incorporation of municipalities. Dillon's Municipal Corporations, Fourth Edition, Par. 36. In Dillon's Municipal Corporations, Fourth Edition, Sec. 39, it is said:

> "Until a comparatively a recent period, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the State. These charters, in all of the states, were framed after the same general model; but in the extent of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety."

As a matter of fact, the City of Des Moines was created by a special act of the legislature of the State of Iowa, approved on the 28th day of January, 1857. It was not until 1860 that a general law for the incorporation of such cities was adopted in Iowa. This law did not apply, in Iowa, however, to cities organized under special charters, unless adopted by them.

Burke vs. Jeffries, 20 Iowa, 145.

With reference to the "consent of the governed" in such corporations, Judge Dillon, Sec., 44, lays down the rule as follows:

> "The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted by the corporators, has no application to statutes creating municipal corporations.* These are laws and as such are imperative and binding according to their terms without any consent, unless the act is expressly made conditional. All who live within the limits of the incorporated district are bound by them, and can withdraw from their operation only by removal. Over such corporations the legislature,

If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: 'If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter.' Graham vs. City of Greenville, 67 Texas, 62."

Applying this proposition to the city of Des Moines, it is obvious that the city could not have assailed the contract which it made with the Des Moines Brick Manufacturing Company for the paving in question upon the ground that there was a defect in the organization of the city.

We call especial attention to the case of Graham vs. City of Greenville, 67 Texas, 62, which is cited by this court, with approval, in the San Angelo case, and which this court says states the general rule. This was a case where Graham contended that certain property owned by him was not liable to taxation, because the territory embracing it had not been legally annexed to the city. It was held that in a suit of this character, no collateral attack could be made upon the municipal corporation, and that it could be questioned only by an action in the name of the state. In the opinion, the courts says:

> "If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter. 'Where the question whether a corporation exists or not arises collaterally,' says Mr. Cooley, 'The courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such;' and this, though the manner of incorporation prescribed by the constitution had not been followed. Cooley Constitution Lim. 311.

Mendota v. Thompson, 20 Ill., 200.
Kettering v. Jacksonville, 50 Ill., 39.
Bird v. Perkins, 38 Mich., 28.

Mr. Dillon, in his work on Municipal Corporations, thus states the law:

"In proceedings to enforce ordinances, the illegality of the corporate organization cannot be shown to defeat a recovery. In such a collateral proceeding, evidence that the corporation is acting as such is all that is required."

In the Town of Decorah vs. Gillis & Espy, 10 Iowa, 284, on a prosecution for violating one of the town ordinances, certain illegalities in the town organization were set up as a defense. With reference to this matter the court says:

"And a further thought is, that defendants cannot raise the question here made in this collateral proceeding. It might as well be claimed that the plat of the village had not been properly acknowledge or recorded; that there was fraud in the proceedings leading to the town organization, or in the passage of the ordinance in question. If the town exists as a corporation de facto, the regularity of its incorporation cannot be inquired into, in this collateral manner."

In Beach on public corporation, section 55, the rule is stated as follows:

"The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation; and consequently where the corporation is acting under color of law and is recognized by the state as so acting, its corporate existence cannot be collaterally attacked."

In Cooley's Constitutional Limitations, 6th edition, pages 309 and 310, the author says, referring to the validity of municipal organizations:

"These questions are generally questions between the incorporators and the city with which private individuals are supposed to have no concern. In proceedings where the question whether the corporation exists or not arises collaterally the courts will not permit its corporate character to be questioned, if it appear to be act-

ing under color of law and recognized by the state as such. Such a question should be raised by the state itself by quo warranto or other direct proceeding. And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state; and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.

In the Circuit Court of Appeals for the Eighth Circuit, in a suit involving the validity of municipal bonds, the same doctrine has been announced. See

National Life Ins. Co. vs. Board of Education, 62 Fed. Rep. 778,

From which we quote:

"When a muicipal body has assumed, under color of authority, and exercised for any considerable period of time with the consent of the state, the powers of a public corporation of a kind recognized by the organic law, *neither the corporation nor any private party* can in private litigation question the legality of its existence."

In Ashley v. Board of Supervisors, 60 Fed. Rep., 55, which is another case involving the validity of municipal bonds, the authorities upon this question are reviewed and the rule adduced from them is stated by the court as follows:

"But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a muicipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the state, the powers of a public corporation of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence."

The case at bar comes directly within this rule. This

is held in the case of the State ex rel. West v. City of Des Moines, that the city had been acting under color of authority and with the acquiescence of the state for a period so long as to create an estoppel against the state.

A recent case in Indiana is:

Powell vs. City of Greensburg, 49 N. E., Rep. 955.
Decided March 29, 1898.

The same proposition is involved. In that case it was held that a property owner, in proceedings to open a street, could not question the authority of the city by collaterally attacking the validity of the annexation of the territory through which the street was to extend.

Another case is

Clement vs. Everest, 29 Mich., 19-22,

From which we make the following extract:

"It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed except by some direct process authorized by law, and then only for very grave reasons.

* * * * *

In such matters as concern the public, and do not interfere with private property or liberty, such action as creates municipal bodies and gives them corporate existence cannot be questioned without creating serious disturbance. If the regularity of their organization can be kept open to question indefinitely, no one could ever be sure that any of the taxes or other matters concerning his own town were valid, and the whole public business might be blocked by litigation."

The following cases sustain this proposition:

Town of Geneva v. Cole, 61 Ill., 397.
Tisdale v. Town of Minonk, 46 Ill., 9.

be held bound by a decree in their favor to the same extent they would be bound by a decree in her favor. We think these conclusions fairly deducible from the following authorities and cases referred to therein: Ewing vs. State, 81 Tex., 172, 16 S. W. Rep. 872; 1 Freem. Judgm. Sec. 178,170,157. That the trial in the first suit was upon the merits, and embraced the whole subject-matter of this litigation, in the sense of rendering the decree an effective adjudication as distinguished from a dismissal upon formal grounds, we entertain no doubt."

This case emphasizes the proposition that not every private individual can, in a private suit, attack the validity of a municipal organization. It certainly cannot be claimed that where the state, which is the proper party to institute such a proceeding, is concluded, the preceeding may be maintained by a private individual.

In conclusion, we therefore submit that the complainants' bill was properly dismissed by the court below, because this is not a suit arising under the Constitution of the United States and because the controversy, in its nature, is one solely cognizable at law which cannot be the subject of a private suit.

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